

Constitutionalising the EU Foreign and Security Policy

Christina Eckes

2020-10-18T03:23:01

In the appeal case of [Bank Refah Kargaran v Council \(C-134/19 P\)](#), the Court of Justice of the European Union (CJEU) has held that the EU Courts have jurisdiction over claims for damages in the area of the Common Foreign and Security Policy (CFSP). This is coherent with the *rationale* of the exceptional exclusion of jurisdiction under CFSP and confirms that the Union's commitment to the rule of law extends to CFSP.

Background and Procedural History

Between 26 July 2010 and 6 September 2013, the appellant, Bank Refah Kargaran, had been included on the list of entities involved in nuclear proliferation in Iran, as annexed to various CFSP decisions and EU Regulations. As a result, its financial funds were frozen during this period. The appellant's name was taken off the list following an [annulment judgment](#) of the General Court on the ground that the statement of reasons for its listing was inadequate. In November 2013, the Council relisted Bank Refah Kargaran based on a different statement of reasons. A section action for annulment against the relisting was unsuccessful.

Bank Refah Kargaran had at all occasions been listed both in the relevant CSFP decisions (Article 29 TEU decision) and the EU regulations (adopted under Article 215 TFEU) giving effect to these CFSP decisions. This is, with very few [exceptions](#), the situation of all persons targeted by EU restrictive measures (sanctions). The breach of procedural rights, such as here the duty to state reasons, has been less exceptional in the history of EU targeted sanctions. The EU courts have annulled many listings for breaching procedural rights (see [here](#) for more details).

In 2015, Bank Refah Kargaran brought an action for damages for the first period of wrongful listings in both CFSP decisions and EU regulations. Different from earlier occasions, on which the General Court had left the issue of jurisdiction in the area of CFSP open, the General Court concluded in this case that it *did not have jurisdiction* to rule on actions for damages relating to compensation for loss allegedly suffered as a result of the adoption of CFSP decisions.

By contrast, the General Court accepted jurisdiction to hear a claim for compensation for damage allegedly suffered resulting from sanctions adopted under Article 215 TFEU regulations. Here, the General Court concluded that a breach of the obligation to state reasons as such does not constitute a ground for liability on the part of the Union. Consequently, the General Court dismissed the action.

On appeal, [Advocate General Hogan](#) concluded that the General Court erred in law and the Court *did have jurisdiction to hear actions for damages* which are directly related to an action for annulment, pursuant to Article 263 TFEU. The AG agreed with the General Court that failure to comply with the obligation to provide reasons does not as such give rise to non-contractual liability on the part of the Union. The ECJ followed the AG on both accounts.

Jurisdiction for actions for damages under the CFSP

As an exception to Article 19 TEU, the Court does not in principle have jurisdiction over CFSP (Article 24(1) sub 2 TEU and Article 275(1) TFEU). Article 275(2) TFEU makes a direct but also limited exception to this exceptional exclusion of jurisdiction. It establishes jurisdiction of the EU Courts ‘to rule on proceedings, brought in accordance with the conditions laid down in [Article 263(4) TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted’ under the CFSP. I have argued before ([here](#) and [here](#)) that this exception to the exception needs to be interpreted widely in light of the general rule and constitutional principles under EU law and that, therefore, it extends to actions for damages.

In *Bank Refah Kargaran v Council*, the ECJ confirmed its jurisdiction for actions for damages under CFSP when EU actions directly target or harm individuals. It argued as follows: First, the *wording* of Article 275(2) TFEU does not address (and hence not exclude) actions for damages (para 31).

On the contrary, the *rationale* of the exceptional exclusion of jurisdiction under CFSP supports this position. As AG Hogan explained (paras 47-8), the exceptional exclusion of judicial review serves the rationale of protecting political discretion of the executive in areas of high-politics and diplomacy can hardly be argued in cases such as the one of *Bank Refah Kargaran*. Such a decision to enter the name of a natural or legal person on a sanctions list is susceptible to review on standard legal grounds. This is precisely the choice of Article 275(2) TFEU.

Second, the ECJ emphasised the role that action for damages play in the overall protection of the individual in the EU legal order (para 34-6). It is a constitutional principle within the EU legal order that damages resulting from wrongful action must be compensated ([Brasserie du Pecheur](#)). This principle forms part of the ECJ's argument that the Union offers a ‘complete system of remedies’, in which relief cannot only be sought in actions for annulment but also through other procedural means, such as Articles 340 and 267 TFEU ([Les Verts](#)).

Third, the ECJ argued that jurisdiction for actions for liability under CFSP leads to the *coherent* result that damages can be awarded both for serious breaches of a legal rule by the CFSP decision and the (in terms of listings identical) EU regulation adopted under Article 215 TFEU (para 37). Logically, the CFSP decision lies at the origin of the reputational damage and stigmatising because this is the first public document to list the individual (para 42).

In addition, *Bank Refah Kargaran v Council* avoids that, in the exceptional circumstances that a person is only listed in the CFSP decision, this person would be left without protection. The ECJ's ruling and emphasis on the stigmatising effect of a CFSP listing stands in vivid contrast with the European Court of Human Rights' decision in [Segi](#), holding that a pre-Lisbon common position (now CFSP decision) did not affect individuals sufficiently directly for them to qualify as victims and have standing under the European Convention on Human Rights.

Finally, the ECJ specifically mentioned that post-Lisbon CFSP forms part of the general (constitutional) legal framework of Union law (para 47), referring to the legal personality of the Union. This also entails (as several scholars have [argued](#)) that constitutional principles of Union law are fully applicable, subject to the specific institutional and procedural arrangements under CFSP.

Broader Significance

Bank Refah Kargaran v Council is highly significant for the constitutionalisation of CFSP and for the protection of individuals. More and more CFSP actions directly impact on fundamental rights. The EU is adopting ever more targeted sanctions. At present, the EU is in the process of adopting an EU Human Rights Sanctions Regime, which could act as a universal tool of response to grave human rights violations across the globe. In addition, other CFSP actions may be attributable to the EU and cause individuals to suffer damages. Examples are unlawful actions of EEAS staff on the ground, military actions, counter-piracy and counter-traffickers operations or security detentions. *Bank Refah Kargaran v Council* confirms the crucial but sometimes disputed point that the Union's commitment to fundamental rights and the rule of law extends to the CFSP and that, consequently, the EU must compensate for harms it causes under the CFSP.

